



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

**[EPA-R08-OAR-2019-0140; EPA-HQ-OAR-2021-0663; FRL-9782-01-R8]**

#### **Air Plan Approval; Colorado; Addressing Remanded Portions of the Previously Approved Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** On January 5, 2021, the United States Court of Appeals for the Tenth Circuit granted the Environmental Protection Agency's (EPA) motion for a voluntary remand without vacatur of two parts of EPA's 2020 final rule approving Colorado's infrastructure state implementation plan (SIP) submission for the 2015 8-hour ozone national ambient air quality standards (NAAQS) (2020 final rule). In this document, EPA proposes to address those two remanded parts of the 2020 final rule: EPA's conclusion that Colorado's infrastructure SIP submission met the State's good neighbor obligation under Clean Air Act (CAA) section 110(a)(2)(D)(i)(I); and EPA's conclusion that Colorado's infrastructure SIP submission provided "necessary assurances" of the State's authority to regulate agricultural sources under CAA section 110(a)(2)(E)(i). EPA is proposing to approve Colorado's infrastructure SIP submission pursuant to CAA section 110.

**DATES:** Written comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**ADDRESSES:** You may send comments, identified as Docket No. EPA-R08-OAR-2019-0140, using the Federal eRulemaking Portal at <https://www.regulations.gov>, following the online instructions for submitting comments. Include Docket ID No. EPA-R08-OAR-2019-0140 in the subject line of the message.

*Instructions:* All submissions received must include Docket ID No. EPA-R08-OAR-2019-0140.

Comments received may be posted without change to <https://www.regulations.gov>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the “Public participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document. Out of an abundance of caution for members of the public and our staff, EPA Docket Center and Reading Room are open to the public by appointment only to reduce the risk of transmitting COVID-19. Our Docket Center staff also continues to provide remote customer service via email, phone, and webform. For further information on EPA Docket Center services and the current status, please visit us online at <https://www.epa.gov/dockets>. Please email or call a person listed in the **FOR FURTHER INFORMATION CONTACT** section if you need to make alternative arrangements for access to the docket.

**FOR FURTHER INFORMATION CONTACT:** Amrita Singh, Air and Radiation Division, EPA, Region 8, Mailcode 8ARD-IO, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, telephone number: (303) 312-6103, email address: [singh.amrita@epa.gov](mailto:singh.amrita@epa.gov); or Ellen Schmitt, telephone number: (303) 312-6728, email address: [schmitt.ellen@epa.gov](mailto:schmitt.ellen@epa.gov).

**SUPPLEMENTARY INFORMATION:** *Public participation:* Submit your comments, identified by Docket No. EPA-R08-OAR-2019-0140, at <https://www.regulations.gov>. Once submitted, comments cannot be edited or removed from the docket. EPA may publish any comment received to its public docket. Do not submit to EPA’s docket at <https://www.regulations.gov> any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e. on the web, cloud, or other file sharing system).

There are two dockets supporting this proposed action, EPA-R08-OAR-2019-0140 and EPA-HQ-OAR-2021-0663. Docket No. EPA-R08-OAR-2019-0140 contains information specific to **Colorado**, including the notice of proposed rulemaking. Docket No. EPA-HQ-OAR-2021-0663 contains additional modeling files, emissions inventory files, technical support documents, and other relevant supporting documentation regarding interstate transport of emissions for the 2015 8-hour ozone NAAQS which are being used to support this proposed action. All comments regarding information in either of these dockets must be made in Docket No. EPA-R08-OAR-2019-0140. For additional submission methods, please email or call a person listed in the **FOR FURTHER INFORMATION CONTACT**. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <https://www.epa.gov/dockets/commenting-epa-dockets>.

The index to Docket No. EPA-HQ-OAR-2021-0663 is available electronically at <https://www.regulations.gov>. While all documents in that docket are listed in the index, some information may not be publicly available due to docket file size restrictions or content (e.g., CBI).

Throughout this document wherever “we,” “us,” or “our” is used, we mean EPA.

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### I. Background

#### A. Statutory and Regulatory Background

On October 1, 2015, EPA promulgated a revision to the ozone NAAQS (2015 8-hour ozone NAAQS), lowering the level of both the primary and secondary standards to 0.070 parts per million (ppm).<sup>1</sup> Section 110(a)(1) of the CAA requires states to submit, within three years after promulgation of a new or revised standard, SIP submissions meeting the applicable requirements of CAA section 110(a)(2).<sup>2</sup>

#### 1. Ozone Transport

One of the applicable requirements of section 110(a)(2) is found in CAA section 110(a)(2)(D)(i)(I), otherwise known as the “interstate transport” or “good neighbor” provision, which generally requires SIPs to contain adequate provisions to prohibit in-state emissions activities from having certain adverse air quality effects on other states due to interstate transport of pollution. There are two so-called “prongs” within CAA section 110(a)(2)(D)(i)(I). A SIP submission for a new or revised NAAQS must contain adequate provisions prohibiting any source or other type of emissions activity within the state from emitting air pollutants in amounts that will significantly contribute to nonattainment of the NAAQS in another state (prong 1) or interfere with maintenance of the NAAQS in another state (prong 2). EPA and states must give independent significance to prong 1 and prong 2 when evaluating downwind air quality problems under CAA section 110(a)(2)(D)(i)(I).<sup>3</sup>

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<sup>1</sup> National Ambient Air Quality Standards for Ozone, Final Rule, 80 FR 65292 (October 26, 2015). Although the level of the standard is specified in the units of ppm, ozone concentrations are also described in parts per billion (ppb). For example, 0.070 ppm is equivalent to 70 ppb.

<sup>2</sup> SIP submissions that are intended to meet the applicable requirements of section 110(a)(1) and (2) of the CAA are often referred to as infrastructure SIPs and the applicable elements under section 110(a)(2) are referred to as infrastructure requirements.

<sup>3</sup> See *North Carolina v. EPA*, 531 F.3d 896, 909-11 (D.C. Cir. 2008).

EPA is using the 4-step interstate transport framework (or 4-step framework) to evaluate state SIP submissions addressing the interstate transport provision for the 2015 8-hour ozone NAAQS. EPA has addressed the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I) with respect to prior ozone NAAQS in several regional regulatory actions, including the Cross-State Air Pollution Rule (CSAPR), which addressed interstate transport with respect to the 1997 ozone NAAQS as well as the 1997 and 2006 fine particulate matter standards,<sup>4</sup> and the CSAPR Update,<sup>5</sup> and the Revised CSAPR Update, both of which addressed the 2008 ozone NAAQS.<sup>6</sup>

Through the development and implementation of the CSAPR rulemakings and prior regional rulemakings pursuant to the interstate transport provision,<sup>7</sup> EPA, working in partnership with states, developed the following 4-step interstate transport framework to evaluate a state's obligations to eliminate interstate transport emissions under the interstate transport provision for the ozone NAAQS: (1) identify monitoring sites that are projected to have problems attaining and/or maintaining the NAAQS (i.e., nonattainment and/or maintenance receptors); (2) identify states that impact those air quality problems in other (i.e., downwind) states sufficiently such that the states are considered "linked" and therefore warrant further review and analysis; (3) identify the emissions reductions necessary (if any), applying a multifactor analysis, to eliminate each linked upwind state's significant contribution to nonattainment or interference with maintenance of the NAAQS at the locations identified in step 1; and (4) adopt permanent and enforceable measures needed to achieve those emissions reductions.

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<sup>4</sup> See Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 FR 48208 (August 8, 2011).

<sup>5</sup> Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS, 81 FR 74504 (October 26, 2016).

<sup>6</sup> In 2019, the United States Court of Appeals for the D.C. Circuit remanded the CSAPR Update to the extent it failed to require upwind states to eliminate their significant contribution by the next applicable attainment date by which downwind states must come into compliance with the NAAQS, as established under CAA section 181(a). *Wisconsin v. EPA*, 938 F.3d 303, 313 (D.C. Cir. 2019). The Revised CSAPR Update for the 2008 Ozone NAAQS, 86 FR 23054 (April 30, 2021), responded to the remand of the CSAPR Update in *Wisconsin* and the vacatur of a separate rule, the "CSAPR Close-Out," 83 FR 65878 (December 21, 2018), in *New York v. EPA*, 781 F. App'x. 4 (D.C. Cir. 2019).

<sup>7</sup> In addition to the CSAPR rulemakings, other regional rulemakings addressing ozone transport include the "NO<sub>x</sub> SIP Call," 63 FR 57356 (October 27, 1998), and the "Clean Air Interstate Rule" (CAIR), 70 FR 25162 (May 12, 2005).

a. Background on EPA's Ozone Transport Modeling Information

In general, EPA has performed nationwide air quality modeling to project ozone design values which are used in combination with measured data to identify nonattainment and maintenance receptors. To quantify the contribution of emissions from specific upwind states on 2023 ozone design values for the identified downwind nonattainment and maintenance receptors, EPA performed nationwide, state-level ozone source apportionment modeling for 2023. The source apportionment modeling provided contributions to ozone at receptors from precursor emissions of anthropogenic nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOC) in individual upwind states.

EPA has released several documents containing projected ozone design values, contributions, and information relevant to evaluating interstate transport with respect to the 2015 8-hour ozone NAAQS. First, on January 6, 2017, EPA published a notice of data availability (NODA) in which we requested comment on preliminary interstate ozone transport data including projected ozone design values and interstate contributions for 2023 using a 2011 base year platform.<sup>8</sup> In the NODA, EPA used the year 2023 as the analytic year for this preliminary modeling because that year aligns with the expected attainment year for moderate ozone nonattainment areas for the 2015 8-hour ozone NAAQS.<sup>9</sup> On October 27, 2017, we released a memorandum (October 2017 memorandum) containing updated modeling data for 2023, which incorporated changes made in response to comments on the NODA, and noted that the modeling may be useful for states developing SIPs to address interstate transport obligations for the 2008 ozone NAAQS.<sup>10</sup> On March 27, 2018, we issued a memorandum (March 2018 memorandum) noting that the same 2023 modeling data released in the October 2017 memorandum could also

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<sup>8</sup> See Notice of Availability of the Environmental Protection Agency's Preliminary Interstate Ozone Transport Modeling Data for the 2015 8-hour Ozone National Ambient Air Quality Standard (NAAQS), 82 FR 1733 (January 6, 2017).

<sup>9</sup> 82 FR 1735.

<sup>10</sup> See Information on the Interstate Transport State Implementation Plan Submissions for the 2008 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I), October 27, 2017, available in Docket No. EPA-HQ-OAR-2021-0663 or at <https://www.epa.gov/node/194139/>.

be useful for identifying potential downwind air quality problems with respect to the 2015 8-hour ozone NAAQS at Step 1 of the 4-step interstate transport framework.<sup>11</sup> The March 2018 memorandum also included the then newly available contribution modeling data to assist states in evaluating their impact on potential downwind air quality problems for the 2015 8-hour ozone NAAQS under Step 2 of the 4-step interstate transport framework.<sup>12</sup> EPA subsequently issued two more memoranda in August and October 2018, providing additional information to states developing interstate transport SIP submissions for the 2015 ozone NAAQS concerning, respectively, potential contribution thresholds that may be appropriate to apply in Step 2 of the 4-step framework, and considerations for identifying downwind areas that may have problems maintaining the standard at Step 1 of the 4-step framework.<sup>13</sup>

Since the release of the modeling data shared in the March 2018 memorandum, EPA performed updated modeling using a 2016-based emissions modeling platform (i.e., 2016v1). This emissions platform was developed under the EPA/Multi-Jurisdictional Organization (MJO)/state collaborative project.<sup>14</sup> This collaborative project was a multi-year joint effort by EPA, the MJOs, and states to develop a new, more recent emissions platform for use by EPA and states in regulatory modeling as an improvement over the dated 2011-based platform that EPA had used to project ozone design values and contribution data provided in the 2017 and 2018 memoranda. EPA used the 2016v1 emissions to project ozone design values and contributions

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<sup>11</sup> See Information on the Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards under Clean Air Act Section 110(a)(2)(D)(i)(I), March 27, 2018 (“March 2018 memorandum”), available in Docket No. EPA-HQ-OAR-2021-0663 or at <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs>.

<sup>12</sup> The March 2018 memorandum, however, provided, “While the information in this memorandum and the associated air quality analysis data could be used to inform the development of these SIPs, the information is not a final determination regarding states’ obligations under the good neighbor provision. Any such determination would be made through notice-and-comment rulemaking.” March 2018 memorandum at 2.

<sup>13</sup> See Analysis of Contribution Thresholds for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, August 31, 2018 (“August 2018 memorandum”), and Considerations for Identifying Maintenance Receptors for Use in Clean Air Act Section 110(a)(2)(D)(i)(I) Interstate Transport State Implementation Plan Submissions for the 2015 Ozone National Ambient Air Quality Standards, October 19, 2018, available in Docket No. EPA-HQ-OAR-2021-0663 or at <https://www.epa.gov/airmarkets/memo-and-supplemental-information-regarding-interstate-transport-sips-2015-ozone-naaqs>.

<sup>14</sup> The results of this modeling, as well as the underlying modeling files, are included in Docket No. EPA-HQ-OAR-2021-0663.

for 2023. On October 30, 2020, in the Notice of Proposed Rulemaking for the Revised CSAPR Update, EPA released and accepted public comment on 2023 modeling that used the 2016v1 emissions platform.<sup>15</sup> Although the Revised CSAPR Update addressed transport for the 2008 ozone NAAQS, the projected design values and contributions from the 2016v1 platform are also useful for identifying downwind ozone problems and linkages with respect to the 2015 ozone NAAQS.<sup>16</sup>

Following the final Revised CSAPR Update, EPA made further updates to the 2016 emissions platform to include mobile emissions from EPA's Motor Vehicle Emission Simulator MOVES3 model<sup>17</sup> and updated emissions projections for electric generating units (EGUs) that reflect the emissions reductions from the Revised CSAPR Update, recent information on plant closures, and other sector trends. The construct of the updated emissions platform, 2016v2, is described in an emissions modeling technical support document (TSD).<sup>18</sup> EPA performed air quality modeling of the 2016v2 emissions using the most recent public release version of the Comprehensive Air-quality Model with extensions (CAMx) photochemical modeling, version 7.10.<sup>19</sup>

EPA now proposes to primarily rely on modeling based on the updated and newly available 2016v2 emissions platform in evaluating these submissions with respect to Steps 1 and 2 of the 4-step framework and generally references it within this action as 2016v2 modeling for 2023. By using the updated modeling results, EPA is using the most current and technically appropriate information for this proposed rulemaking. Section III of this document and the Air Quality Modeling TSD for 2015 Ozone NAAQS Transport SIP Proposed Actions, included in

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<sup>15</sup> See Revised CSAPR Update for the 2008 Ozone NAAQS, 85 FR 68964, 68981 (October 30, 2020).

<sup>16</sup> See the Air Quality Modeling Technical Support Document for the Final Revised Cross-State Air Pollution Rule Update, included in the Headquarters Docket No. EPA-HQ-OAR-2021-0663.

<sup>17</sup> Additional details and documentation related to the MOVES3 model can be found at <https://www.epa.gov/moves/latest-version-motor-vehicle-emission-simulator-moves>.

<sup>18</sup> See Technical Support Document (TSD) Preparation of Emissions Inventories for the 2016v2 North American Emissions Modeling Platform. Dated: February 2022. (2016v2 TSD). Included under Docket No. EPA-HQ-OAR-2021-0663.

<sup>19</sup> Ramboll Environment and Health, January 2021, [www.camx.com](http://www.camx.com).



Docket No. EPA-HQ-OAR-2021-0663 for this proposal, contain additional detail on EPA's 2016v2 modeling. EPA is accepting public comment on this updated 2023 modeling, which uses a 2016v2 emissions platform as the modeling pertains to this proposed action. Comments on EPA's air quality modeling as used in this proposed action should be submitted in the Regional docket for this action, Docket No. EPA-R08-OAR-2019-0140. EPA is not accepting comments in Docket No. EPA-HQ-OAR-2021-0663.

## 2. Necessary Assurances of State Authority

CAA section 110(a)(2)(E)(i) requires that a state provide "necessary assurances" that it will have, among other things, adequate authority under state law to carry out its SIP to meet CAA requirements with respect to the relevant NAAQS.<sup>20</sup> Specifically, a state's infrastructure SIP submission should show that the state has the legal authority to carry out the provisions identified in the state's infrastructure SIP submission and is not prohibited by federal or state law from carrying out the SIP submission.

### *B. EPA's 2020 Action and the 2021 Voluntary Remand*

On September 17, 2018, the State of Colorado submitted to EPA its infrastructure SIP submission for the 2015 ozone NAAQS. On July 29, 2019, EPA proposed to approve Colorado's submission with respect to all relevant CAA elements.<sup>21</sup> EPA proposed approval of the portion of Colorado's infrastructure SIP related to prongs 1 and 2 of CAA section 110(a)(2)(D)(i)(I), primarily relying on the 2023 modeling (2011 base year platform) presented in the March 2018 memorandum.<sup>22</sup> EPA's analysis of the 2023 modeling indicated that Colorado's largest impacts at any identified downwind receptor would be less than 1 percent (0.70 ppb) of the 2015 ozone NAAQS.<sup>23</sup> Thus, EPA proposed to find that Colorado's emissions would not significantly

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<sup>20</sup> 42 U.S.C. 7410(a)(2)(E)(i).

<sup>21</sup> Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota, 84 FR 36516 (July 29, 2019). In the same rulemaking EPA also proposed to act on North Dakota's infrastructure SIP submission for the 2015 ozone NAAQS. EPA's final action with respect to North Dakota's SIP submission was neither challenged nor remanded and thus is not addressed in this action.

<sup>22</sup> 84 FR 36516, 36524-25.

<sup>23</sup> *Id.* n.24.

contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.<sup>24</sup>

On September 13, 2019, the United States Court of Appeals for the D.C. Circuit issued a decision in *Wisconsin v. EPA*, remanding the CSAPR Update to the extent that it failed to require upwind states to eliminate their significant contribution by the next applicable attainment date by which downwind states must come into compliance with the NAAQS, as established under CAA section 181(a).<sup>25</sup> In our 2020 final rule (published on April 10, 2020), EPA defended the use of the 2023 analytical year on the basis of what was then, in the Agency’s view, a position consistent with *Wisconsin*—specifically that the *Wisconsin* holding did not apply with respect to the attainment date for marginal areas.<sup>26</sup> However, EPA also offered an alternative rationale. EPA used linear interpolation to estimate Colorado’s maximum contribution to a potential receptor in 2021 and concluded that even if it were appropriate to use the 2021 marginal area date rather than the 2023 moderate area date, Colorado’s impacts would be similar to those projected for 2023 and thus it would not significantly contribute to nonattainment or interfere with maintenance in other states.<sup>27</sup>

On May 19, 2020, the D.C. Circuit issued a ruling in *Maryland v. EPA* that cited the *Wisconsin* decision in holding that EPA must assess the impact of interstate transport on air quality at the next downwind attainment date, including marginal area attainment dates, in evaluating the basis for EPA’s denial of a petition under CAA section 126(b).<sup>28</sup> The court noted that “section 126(b) incorporates the Good Neighbor Provision,” and, therefore, “EPA must find a violation [of section 126] if an upwind source will significantly contribute to downwind

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<sup>24</sup> 84 FR 36524-25.

<sup>25</sup> 938 F.3d at 313.

<sup>26</sup> Approval and Promulgation of State Implementation Plan Revisions; Infrastructure Requirements for the 2015 Ozone National Ambient Air Quality Standards; Colorado and North Dakota, 85 FR 20169, 20169-71 (April 10, 2020).

<sup>27</sup> Id. at 20169.

<sup>28</sup> 958 F.3d 1185, 1203-04 (D.C. Cir. 2020).

nonattainment at the next downwind attainment deadline. Therefore, the Agency must evaluate downwind air quality at that deadline, not at some later date.” *Id.* at 1204 (emphasis added).

On June 9, 2020, the Center for Biological Diversity (Center) filed a petition for review of the 2020 final rule in the United States Court of Appeals for the Tenth Circuit (Tenth Circuit).<sup>29</sup> The Center challenged two sub-elements of the SIP approval: (1) EPA’s conclusion that Colorado’s infrastructure SIP submission satisfies the good neighbor provision, CAA section 110(a)(2)(D)(i)(I); and (2) EPA’s conclusion that the State’s infrastructure SIP submission satisfies Colorado’s obligation to provide necessary assurances that the State has authority to regulate all agricultural sources of air pollution as may be required by the CAA section 110(a)(2)(E)(i).<sup>30</sup>

In challenging EPA’s approval of the portion of Colorado’s infrastructure SIP submission addressing CAA section 110(a)(2)(D)(i)(I), the Center argued that EPA’s analysis focused on the wrong analytical year, failed to adequately analyze all of the relevant potential out-of-state receptor locations, and should have accounted for air quality impacts from various proposed and final federal rules.<sup>31</sup>

With respect to the state authority issue, the Center argued that a provision of state law, Colo. Rev. Stat. § 25-7-109(8)(a), bars Colorado from regulating agricultural sources other than those that are major sources. The Center argued that this means that Colorado’s infrastructure SIP submission failed to provide “necessary assurances” of the State’s authority to regulate all agricultural sources, as may be needed to comply with CAA requirements for SIPs, pursuant to CAA section 110(a)(2)(E)(i).<sup>32</sup>

On December 31, 2020, EPA filed a motion for a voluntary remand without vacatur of the two challenged parts of the 2020 final rule. EPA stated that it intended to consider additional

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<sup>29</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.).

<sup>30</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), Petitioner’s Opening Brief at 10-11.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

information, including the *Maryland* decision and new information developed after EPA issued the 2020 final rule that was not available in the administrative record for the 2020 final rule.<sup>33</sup> The Tenth Circuit granted EPA's motion on January 5, 2021.<sup>34</sup>

In this document, EPA proposes to address the two remanded portions of EPA's 2020 final rule by proposing to approve Colorado's infrastructure SIP submission for the 2015 ozone standards with respect to CAA section 110(a)(2)(D)(i)(I) and (E)(i). EPA seeks comment on its conclusions under CAA section 110(a)(2)(D)(i)(I) and (E)(i) in this proposed approval. We are not otherwise addressing or reopening for comment any of the other portions of our 2020 final rule. We will deem any comments on such portions beyond the scope of this action.

## **II. EPA's Evaluation and Proposed Approval of Colorado's Infrastructure SIP Submission**

### **Under CAA Section 110(a)(2)(D)(i)(I) and (E)(i)**

#### *A. Good Neighbor Provision*

##### **1. EPA's Approach to Evaluating Interstate Transport SIP Submissions for the 2015 8-hour ozone NAAQS**

EPA proposes to apply a consistent set of policy judgments across all states for purposes of evaluating interstate transport obligations and the approvability of interstate transport SIP submissions for the 2015 8-hour ozone NAAQS. These policy judgments reflect consistency with relevant case law and past agency practice as reflected in the CSAPR and related rulemakings. Nationwide consistency in approach is particularly important in the context of interstate ozone transport, which is a regional-scale pollution problem involving many smaller contributors. Effective policy solutions to the problem of interstate ozone transport going back to the NO<sub>x</sub> SIP Call have necessitated the application of a uniform framework of policy judgments in order to ensure an "efficient and equitable" approach.<sup>35</sup>

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<sup>33</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), EPA's Motion for Voluntary Remand, Ex. 1, Declaration in Support of Motion for Voluntary Remand, at ¶ 8-10.

<sup>34</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), January 5, 2021 Order.

<sup>35</sup> See *EME Homer City Generation, LP v. EPA*, 572 U.S. 489, 519 (2014). As discussed later in this section, EPA recognizes that the nature of high ozone levels due to wintertime inversion conditions in the Uinta Basin in Utah raises unique analytical challenges in assessing whether there is transport from Colorado during those wintertime

The remainder of this section describes EPA’s proposed framework with respect to analytic year, definition of nonattainment and maintenance receptors, selection of contribution threshold, and multifactor control strategy assessment.

## 2. Selection of Analytic Year

In general, the states and EPA must implement the interstate transport provision in a manner “consistent with the provisions of [title I of the CAA].”<sup>36</sup> This requires, among other things, that these obligations are addressed consistently with the timeframes for downwind areas to meet their CAA obligations. With respect to ozone NAAQS, under CAA section 181(a), this means obligations must be addressed “as expeditiously as practicable” and no later than the schedule of attainment dates provided in CAA section 181(a)(1).<sup>37</sup> As discussed in Section I of this proposed rulemaking, recent case law makes clear that the states and the Agency are obligated, under the good neighbor provision, to assess downwind air quality as expeditiously as practicable and no later than the next applicable attainment date. This is now the moderate area attainment date under CAA section 181 for ozone nonattainment. The moderate area attainment date for the 2015 8-hour ozone NAAQS is August 3, 2024.<sup>38</sup> EPA believes that 2023 is now the appropriate year for analysis of interstate transport obligations for the 2015 8-hour ozone NAAQS, because the 2023 ozone season is the last relevant ozone season during which achieved emissions reductions in linked upwind states could assist downwind states with meeting the August 3, 2024, moderate area attainment date for the 2015 8-hour ozone NAAQS.

EPA recognizes that the attainment date for nonattainment areas classified as marginal for the 2015 8-hour ozone NAAQS was August 3, 2021. Under the *Maryland* holding, any necessary emissions reductions to satisfy interstate transport obligations should have been

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episodes. EPA has separately analyzed that unique situation and proposes to conclude that emissions from Colorado do not contribute to high ozone levels in Utah. That analysis, however, is separate from the generally applicable 4-step analytical framework for ozone transport described here.

<sup>36</sup> 42 U.S.C. 7410(a)(2)(D)(i).

<sup>37</sup> For attainment dates for the 2015 8-hour ozone NAAQS, refer to 42 U.S.C. 7511(a), 40 CFR 51.1303, and Additional Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards, 83 FR 25776 (June 4, 2018, effective August 3, 2018).

<sup>38</sup> See 42 U.S.C. 7511(a); 40 CFR 51.1303; 83 FR 25776.

implemented by no later than this date. At the time of the statutory deadline to submit interstate transport SIPs (October 1, 2018), many states, including Colorado, relied upon EPA modeling of the year 2023, and no state provided an alternative analysis using a 2021 analytic year (or the prior 2020 ozone season). EPA appreciates that among the arguments raised by the Center in challenging the 2020 final rule was the failure to analyze a year earlier than 2023. However, EPA must act on SIP submissions—even in this action on remand—using the information available at the time it takes such action. In this circumstance, EPA does not believe it would be appropriate to evaluate Colorado’s obligations under CAA section 110(a)(2)(D)(i)(I) as of an attainment date that is wholly in the past, because the Agency interprets the interstate transport provision as forward looking.<sup>39</sup> It would not make sense to analyze air quality, contribution levels, or emissions control strategies for the 2021 attainment date, for purposes of interstate transport obligations, when no emissions reductions, if shown to be needed, could be implemented by that date anyway.<sup>40</sup> Consequently, in this proposal EPA will use the analytical year of 2023 to evaluate Colorado’s CAA section 110(a)(2)(D)(i)(I) SIP submission with respect to the 2015 8-hour ozone NAAQS.

### 3. Step 1 of the 4-Step Interstate Transport Framework

In Step 1, EPA identifies monitoring sites that are projected to have problems attaining and/or maintaining the NAAQS in the 2023 analytic year. Where EPA’s analysis shows that a site does not fall under the definition of a nonattainment or maintenance receptor, that site is excluded from further analysis under EPA’s 4-step interstate transport framework. For sites that are identified as a nonattainment or maintenance receptor in 2023, we proceed to the next step of our 4-step interstate transport framework by identifying the upwind state’s contribution to those receptors.

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<sup>39</sup> See 86 FR 23074; see also *Wisconsin*, 938 F.3d at 322.

<sup>40</sup> Nor does EPA view 2022 as a reasonable analytic year for a similar reason: it would be impossible to finalize this action and implement any emissions reductions measures that could be shown to be needed by the 2022 ozone season. Thus, 2023 is the appropriate analytic year and also aligns with the next attainment date.

EPA’s approach to identifying ozone nonattainment and maintenance receptors in this action is consistent with the approach used in previous transport rulemakings. EPA’s approach gives independent consideration to both the “contribute significantly to nonattainment” and the “interfere with maintenance” prongs of CAA section 110(a)(2)(D)(i)(I), consistent with the D.C. Circuit’s direction in *North Carolina v. EPA*.<sup>41</sup>

For this proposal, EPA identifies nonattainment receptors as those monitoring sites that are projected to have average design values that exceed the NAAQS and that are also measuring nonattainment based on the most recent monitored design values. This approach is consistent with prior transport rulemakings, such as the CSAPR Update, where EPA defined nonattainment receptors as those areas that both currently measure nonattainment and that EPA projects will be in nonattainment in the future analytic year (i.e., 2023).<sup>42</sup>

In addition, in this proposal, EPA identifies a receptor to be a “maintenance” receptor for purposes of defining interference with maintenance, consistent with the method used in the CSAPR and upheld by the D.C. Circuit in *EME Homer City Generation, L.P. v. EPA*.<sup>43</sup> Specifically, EPA identified maintenance receptors as those receptors that would have difficulty maintaining the relevant NAAQS in a scenario that takes into account historical variability in air quality at that receptor. The variability in air quality was determined by evaluating the “maximum” future design value at each receptor based on a projection of the maximum measured design value over the relevant period. EPA interprets the projected maximum future design value to be a potential future air quality outcome consistent with the meteorology that yielded maximum measured concentrations in the ambient data set analyzed for that receptor (i.e., ozone conducive meteorology). EPA also recognizes that previously experienced

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<sup>41</sup> See 531 F.3d at 910-11 (holding that EPA must give “independent significance” to each prong of CAA section 110(a)(2)(D)(i)(I)).

<sup>42</sup> See 81 FR 74504. This same concept, relying on both current monitoring data and modeling to define nonattainment receptor, was also applied in CAIR. See 70 FR at 25241, 25249 (January 14, 2005); see also *North Carolina*, 531 F.3d at 913-14 (affirming as reasonable EPA’s approach to defining nonattainment in CAIR).

<sup>43</sup> 795 F.3d 118, 136 (D.C. Cir. 2015); see 76 FR 48208 (August 8, 2011). CSAPR Update and Revised CSAPR Update also used this approach. See 81 FR 74504 and 86 FR 23054.

meteorological conditions (e.g., dominant wind direction, temperatures, air mass patterns) promoting ozone formation that led to maximum concentrations in the measured data may reoccur in the future. The maximum design value gives a reasonable projection of future air quality at the receptor under a scenario in which such conditions do, in fact, reoccur. The projected maximum design value is used to identify upwind emissions that, under those circumstances, could interfere with the downwind area's ability to maintain the NAAQS.

Recognizing that nonattainment receptors are also, by definition, maintenance receptors, EPA often uses the term "maintenance-only" to refer to those receptors that are not nonattainment receptors. Consistent with the concepts for maintenance receptors, as described above, EPA identifies "maintenance-only" receptors as those monitoring sites that have projected average design values above the level of the applicable NAAQS, but that are not currently measuring nonattainment based on the most recent official design values. In addition, those monitoring sites with projected average design values below the NAAQS, but with projected maximum design values above the NAAQS are also identified as "maintenance-only" receptors, even if they are currently measuring nonattainment based on the most recent official design values.

#### 4. Step 2 of the 4-Step Interstate Transport Framework

In Step 2, EPA quantifies the contribution of each upwind state to each receptor in the 2023 analytic year. The contribution metric used in Step 2 is defined as the average impact from each state to each receptor on the days with the highest ozone concentrations at the receptor based on the 2023 modeling. If a state's contribution value does not equal or exceed the threshold of 1 percent of the NAAQS (i.e., 0.70 ppb for the 2015 8-hour ozone NAAQS), the upwind state is not "linked" to a downwind air quality problem, and EPA, therefore, concludes that the state does not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in the downwind states. However, if a state's contribution equals or exceeds the 1 percent threshold, the state's emissions are further evaluated in Step 3, considering both air



quality and cost as part of a multi-factor analysis, to determine what, if any, emissions might be deemed “significant” and, thus, must be eliminated under CAA section 110(a)(2)(D)(i)(I). EPA is proposing to rely in the first instance on the 1 percent threshold for the purpose of evaluating a state’s contribution to nonattainment or maintenance of the 2015 8-hour ozone NAAQS (i.e., 0.70 ppb) at downwind receptors. This is consistent with the Step 2 approach that EPA applied in CSAPR for the 1997 ozone NAAQS, which has subsequently been applied in the CSAPR Update when evaluating interstate transport obligations for the 2008 ozone NAAQS. EPA continues to find 1 percent to be an appropriate threshold.

For ozone, as EPA found in the Clean Air Interstate Rule (CAIR), CSAPR, and CSAPR Update, a portion of the nonattainment problems from anthropogenic sources in the United States results from the combined impact of relatively small contributions from many upwind states, along with contributions from in-state sources and, in some cases, substantially larger contributions from a subset of particular upwind states. EPA’s analysis shows that much of the ozone transport problem being analyzed in this proposed rule is still the result of the collective impacts of contributions from many upwind states. Therefore, application of a consistent contribution threshold is necessary to identify those upwind states that should have responsibility for addressing their contribution to the downwind nonattainment and maintenance problems to which they collectively contribute. Continuing to use 1 percent of the NAAQS as the screening metric to evaluate collective contribution from many upwind states also allows EPA (and states) to apply a consistent framework to evaluate interstate emissions transport under the interstate transport provision from one NAAQS to the next.<sup>44</sup>

#### 5. Step 3 of the 4-Step Interstate Transport Framework

Consistent with EPA’s longstanding approach to eliminating significant contribution or interference with maintenance, at Step 3, states linked at Steps 1 and 2 are generally expected to

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<sup>44</sup> See 81 FR 74518. See also 86 FR 23085 (reviewing and explaining rationale from CSAPR, 76 FR 48237-38, for selection of 1 percent threshold).

prepare a multifactor assessment of potential emissions controls. EPA's analysis at Step 3 in prior federal actions addressing interstate transport requirements has focused primarily on an evaluation of cost-effectiveness of potential emissions controls (on a marginal cost-per-ton basis), the total emissions reductions that may be achieved by requiring such controls (if applied across all linked upwind states), and an evaluation of the air quality impacts such emissions reductions would have on the downwind receptors to which a state is linked; other factors may potentially be relevant if adequately supported. In general, where EPA's or alternative air quality and contribution modeling establishes that a state is linked at Steps 1 and 2, it will be insufficient at Step 3 for a state merely to point to its existing rules requiring control measures as a basis for approval. In general, the emissions-reducing effects of all existing emissions control requirements are already reflected in the air quality results of the modeling for Steps 1 and 2. If the state is shown to still be linked to one or more downwind receptor(s), states must provide a well-documented evaluation determining whether their emissions constitute significant contribution or interference with maintenance by evaluating additional available control opportunities by preparing a multifactor assessment. While EPA has not prescribed a particular method for this assessment, EPA expects states at a minimum to present a sufficient technical evaluation. This would typically include information on emissions sources, applicable control technologies, emissions reductions, costs, cost effectiveness, and downwind air quality impacts of the estimated reductions, before concluding that no additional emissions controls should be required.<sup>45</sup>

#### 6. Step 4 of the 4-Step Interstate Transport Framework

At Step 4, states (or EPA) develop permanent and federally enforceable control strategies to achieve the emissions reductions determined to be necessary at Step 3 to eliminate significant

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<sup>45</sup> As examples of general approaches for how such an analysis could be conducted for their sources, states could look to the CSAPR Update, 81 FR 74504, 74539-51; CSAPR, 76 FR 48208, 48246-63; CAIR, 70 FR 25162, 25195-229; or the NO<sub>x</sub> SIP Call, 63 FR 57356, 57399-405. See also Revised CSAPR Update, 86 FR 23054, 23086-23116. Consistently across these rulemakings, EPA has developed emissions inventories, analyzed different levels of control stringency at different cost thresholds, and assessed resulting downwind air quality improvements.

contribution to nonattainment or interference with maintenance of the NAAQS. For a state linked at Steps 1 and 2 to rely on an emissions control measure at Step 3 to address its interstate transport obligations, that measure must be included in the state's SIP so that it is permanent and federally enforceable.<sup>46</sup>

#### 7. EPA's Evaluation of Colorado's CAA Section 110(a)(2)(D)(i)(I) Submission

As mentioned above, the State of Colorado submitted a SIP submission to EPA on September 17, 2018, to meet the good neighbor requirements for the 2015 ozone NAAQS. In its prong 1 and prong 2 analysis, Colorado's SIP submission relies on analysis of the year 2023 (using a 2011 base year platform), among other things, to conclude that the State does not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.<sup>47</sup> As explained in Section I of this proposed rulemaking, EPA has conducted an updated analysis for the 2023 analytical year (using a 2016 base year platform) and proposes to rely primarily on this updated modeling to evaluate Colorado's transport SIP submission.

As described in Section I, EPA performed air quality modeling to project design values and contributions for 2023 using the 2016v2 emissions platform. EPA examined these data to determine if emissions in Colorado contribute at or above the threshold of 1 percent of the 2015 8-hour ozone NAAQS (0.70 ppb) to any downwind nonattainment or maintenance receptor in this most recent round of modeling. The data<sup>48</sup> indicate that the highest contribution in 2023 from Colorado to a downwind nonattainment or maintenance receptor is 0.06 ppb and 0.20 ppb, respectively.<sup>49</sup> Specifically, EPA's analysis indicates that Colorado will have a 0.06 ppb impact

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<sup>46</sup> See 42 U.S.C. 7410(a)(2)(D) ("Each such [SIP] shall . . . contain adequate provisions . . ."); see also 42 U.S.C. 7410(a)(2)(A); *Committee for a Better Arvin v. EPA*, 786 F.3d 1169, 1175-76 (9th Cir. 2015) (holding that measures relied on by state to meet CAA requirements must be included in the SIP).

<sup>47</sup> Letter from Dr. Larry Wolk, Executive Director, Colorado Department of Health & Environment, to Douglas Benevento, Regional Administrator, EPA Region 8, Attachment 9, Adopted SIP at 4-5 (August 16, 2018) (Colorado SIP Submission).

<sup>48</sup> Design values and contributions at individual monitoring sites nationwide are provided in the file "2016v2\_DVs\_state\_contributions.xlsx," which is included in Docket No. EPA-HQ-OAR-2021-0663.

<sup>49</sup> Both 0.06 ppb and 0.20 ppb are below the 1 percent threshold of the 2015 ozone NAAQS (.70 ppb).

at the projected nonattainment receptor in Kenosha County, Wisconsin (Site ID 550590019), which has a 2023 projected average design value of 72.8 ppb and a 2023 projected maximum design value of 73.7 ppb. EPA's analysis further indicates that Colorado will have a 0.20 ppb impact at a projected maintenance receptor in Denton County, Texas (Site ID 481210034), which has which has a projected 2023 average design value of 70.4 ppb and a 2023 projected maximum design value of 72.2 ppb. The data also indicate that the only contribution in 2023 from Colorado to any downwind monitor above the 1 percent threshold is to a monitor in San Juan, New Mexico (0.99 ppb). This monitor's 2023 average and maximum design values are projected to be below the 2015 ozone NAAQS and the monitor is therefore not projected to be a nonattainment and/or maintenance receptor for the 2015 ozone NAAQS. Accordingly, EPA proposes to conclude that the most recent data support EPA's conclusion that Colorado does not contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.

In its comments on the 2020 rule and in its brief in the Tenth Circuit litigation, the Center identified several downwind areas that it argued may have been in nonattainment in 2020 but that EPA had screened out by using the incorrect analytic year of 2023. These included: Tarrant and Denton County, Texas; the Northern and Southern Wasatch Fronts in Utah; and monitors in New Mexico.<sup>50</sup> In response to this argument, EPA is providing in Table 1 the projected 2023 design values (DV) and associated contributions from Colorado for all monitors located in these areas for which EPA's modeling provides valid contribution data.<sup>51</sup>

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<sup>50</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), Petitioner's Opening Brief at 29-31.

<sup>51</sup> As described in the Air Quality Modeling Technical Support Document 2015 Ozone NAAQS Transport SIP Proposed Actions, EPA's method for calculating an average contribution metric for use in Step 2 of the 4-step transport framework is based on the average of daily contributions on the top 10 ozone concentrations days as modeled in 2023. However, in order to avoid including contributions on days with low ozone concentrations, EPA requires at least 5 days with model-predicted maximum daily average 8-hour ozone concentrations greater than or equal to 60 ppb. In EPA's method, contribution metric values are not calculated for monitors with fewer than 5 days that meet the 60 ppb threshold. As a result of applying this criterion, there were three monitoring sites in the areas identified by the Center, excluding the Uinta Basin, that are projected to have problems attaining and/or maintaining the NAAQS in 2023 for which EPA did not calculate contribution metric values. These monitors include two sites in Dona Ana County, New Mexico, and one site in Toole County, Utah. Although EPA does not have contribution data for these specific monitors, the data at near-by monitors indicate that the contributions from Colorado to Dona Ana and Toole Counties are expected to be well below the 1 percent threshold. Specifically, the contribution from Colorado to a monitoring site in El Paso, Texas, which is in the Dona Ana-El Paso interstate nonattainment area, is

**Table 1. Colorado Contributions and Select Monitors**

<b>Monitor (AQS Site ID)</b>	<b>State</b>	<b>County</b>	<b>Projected 2023 Average DV</b>	<b>Projected 2023 Maximum DV</b>	<b>Colorado Contribution(ppb)</b>
350010029	New Mexico	Bernalillo	62.0	62.7	0.27
350450018	New Mexico	San Juan	64.7	66.6	1.00
350610008	New Mexico	Valencia	62.2	63.9	0.30
481210034	Texas	Denton	70.4	72.2	0.20
481211032	Texas	Denton	67.2	69.0	0.22
484393009	Texas	Tarrant	68.0	68.7	0.17
481410029	Texas	El Paso	62.3	64.6	0.04
490030003	Utah	Box Elder	65.2	66.5	0.02
490110004	Utah	Davis	72.9	75.1	0.03
490353006	Utah	Salt Lake	73.6	75.3	0.03
490353013	Utah	Salt Lake	74.4	74.9	0.03
490570002	Utah	Weber	70.6	72.5	0.02
490571003	Utah	Weber	70.5	71.5	0.02

Table 1 shows that there are six monitors predicted to be violating the 2015 ozone NAAQS in 2023, one in Texas and five in Utah.<sup>52</sup> However, Colorado’s projected contribution to each of these monitors is below the 1 percent threshold. Thus, no further analysis is required to address Colorado’s good neighbor obligations for the areas relevant to the listed monitors at Step 3.

The Center also claimed that it could not find any documents in the record which address Colorado’s contribution to nonattainment in the Uinta Basin.<sup>53</sup> EPA projected the design values for several of the monitoring sites in Duchesne County and Uintah County, Utah, but the Agency’s modeling represents summertime ozone conditions and is not designed to capture the conditions that result in the high wintertime ozone concentrations in the Uinta Basin nonattainment area.

In order to characterize potential transport from Colorado to the Uinta Basin nonattainment area in the absence of reliable modeling to inform wintertime ozone levels and contributions, EPA conducted a separate analysis for the Uinta Basin, which is provided in a

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0.04 ppb and, as indicated in Table 1, the contributions from Colorado to monitoring sites in Salt Lake County, which is closer to Colorado than Toole County, are 0.03 ppb.

<sup>52</sup> See monitors 481210034, 490110004, 490353006, 490353013, 490570002, and 490571003.

<sup>53</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), Petitioner’s Opening Brief at 30.

Uinta Basin TSD accompanying this action and included in Docket

EPA-R08-OAR-2019-0140.<sup>54</sup> To summarize EPA's TSD findings, the ozone levels in the Uinta Basin nonattainment area are caused by a combination of meteorological inversion conditions, the unique topography of the Uinta Basin, and significant emissions of ozone precursors from sources within Utah. Generally, EPA concludes that ozone-precursor emissions do not transport into the Uinta Basin from outside the area during wintertime inversion episodes that produce high ozone conditions. Further, with respect to the portion of Colorado located within the regional Uinta Basin, available data shows that, because of low wind speed during wintertime inversion conditions and the unique topographical features within the regional Uinta Basin, emissions from the relevant area of Colorado are unlikely to transport to the Utah portion of the Uinta Basin.<sup>55</sup>

EPA reaches these conclusions recognizing the unique challenges associated with characterizing wintertime ozone concentrations and contributions in the Uinta Basin. As such, for this portion of the analysis, EPA is supplementing the consistently applied 4-step interstate transport framework used to characterize ozone transport at a broader, regional scale and during the summertime ozone season. Based on the information and analysis presented in the Uinta Basin TSD, EPA proposes to find that it is reasonable to conclude that Colorado does not significantly contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in the Utah portion of the Uinta Basin.<sup>56</sup>

In summary, based on the analyses provided in this document and in the Uinta Basin TSD, EPA proposes to conclude that emissions from sources in Colorado will not contribute to nonattainment or interfere with maintenance of the 2015 ozone NAAQS in any other state.

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<sup>54</sup> EPA, Technical Support Document, Ozone Transport Analysis: Colorado and the Uinta Basin Nonattainment Area, April 2022 (Uinta Basin TSD).

<sup>55</sup> Id.

<sup>56</sup> Id.

Accordingly, EPA proposes to approve Colorado’s infrastructure SIP submission for the 2015 ozone NAAQS under CAA section 110(a)(2)(D)(i)(I).

## 8. Emissions Assumptions Used in Modeling

The Center argued that in the context of evaluating Colorado’s good neighbor SIP submission, EPA should have accounted for air quality impacts from various proposed and final federal rules.<sup>57</sup> EPA’s normal practice is to include in its modeling only changes in emissions from final regulatory actions because, until such rules are finalized, any potential changes in NO<sub>x</sub> or VOC emissions are speculative. EPA’s updated 2023 modeling using the 2016v2 platform reflects an updated assessment of the emissions inventory nationwide based on changes in federal and state rules and other relevant changes in the emissions inventory known at the time this latest modeling was conducted. All assumptions that formed the basis of the updated 2023 modeling (2016v2) are available in the emissions modeling TSD.<sup>58</sup> EPA encourages commenters to review this information, which supports the updated basis for this proposed action. This information supersedes the older modeling of 2023 that had been used in the 2020 final rule (2011 base year platform).

### *B. Colorado’s Authority to Regulate Agricultural Emissions*

#### 1. EPA’s Prior Approval

CAA section 110(a)(2)(E)(i) requires that a state must provide “necessary assurances” that it has, among other things, adequate authority under state law to carry out the provisions of its SIP with respect to the relevant NAAQS. In the context of an infrastructure SIP submission, EPA expects states to provide such necessary assurances for the new or revised NAAQS at issue.

In its September 17, 2018 infrastructure SIP submission, Colorado stated that “[t]here are no state or federal provisions prohibiting the implementation of any provision of the Colorado SIP.” Specifically, Colorado cited to its “general authority to adopt the rules and regulations

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<sup>57</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), Petitioner’s Opening Brief at 33-37.

<sup>58</sup> See generally 2016v2 TSD; see also, e.g., 2016v2 TSD Section 4, 157-213.

necessary to implement the SIP” as “set out in the Colorado Air Pollution Prevention and Control Act Section 25-7-105 of the Colorado Revised Statutes (C.R.S);” general authority to administer and enforce the program in C.R.S. 25-7-111; additional authority to regulate air pollution and implement provisions in the SIP in the Colorado Air Pollution Prevention and Control Act, Article 7 of title 25; and authority delegated under C.R.S. 42-4-301 through 42-4-414 (concerning motor vehicle emissions) and 42-4-414, C.R.S. (concerning emissions from diesel-powered vehicles).<sup>59</sup>

The Center commented on EPA’s proposed approval of the State’s infrastructure SIP submission, stating that C.R.S. 25-7-109(8)(a) prohibits Colorado from regulating agricultural sources of air pollution unless they are major sources. EPA evaluated the Center’s concern with respect to Colorado’s authority. In response, EPA explained that the provision cited by the Center does not bar the State from carrying out its existing SIP, and that in fact, the provision *requires* regulation of agricultural sources if they are major stationary sources, *or* if regulation is required by Part C, Part D, or title V of the CAA. In other words, EPA interpreted the provision to mean that if it is necessary to regulate agricultural sources beyond those that are major sources in order to attain and maintain the NAAQS, then the State has authority to do so. EPA noted that whether Colorado will need additional emission limitations and other control measures for areas designated nonattainment for the 2015 ozone NAAQS will be evaluated by the State and EPA as part of the State’s attainment plan under CAA title I part D through a separate process. Thus, EPA found that Colorado does not lack authority to implement the SIP and concluded instead that Colorado’s infrastructure SIP satisfied CAA section 110(a)(2)(E)(i).<sup>60</sup>

## 2. EPA’s Revised Analysis on Remand Under CAA Section 110(a)(2)(E)(i)

In its brief filed in the Tenth Circuit litigation, the Center renewed its argument challenging EPA’s approval of Colorado’s infrastructure SIP submission as meeting CAA

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<sup>59</sup> Colorado SIP Submission, Attachment 9, Adopted SIP at 6.

<sup>60</sup> 85 FR 20171.



section 110(a)(2)(E)(i) for the 2015 ozone NAAQS. The Center argued that EPA erred in approving Colorado's infrastructure SIP submittal under CAA section 110(a)(2)(E)(i) because C.R.S. 25-7-109(8)(A) bars Colorado from regulating agricultural sources other than those that are major sources. In particular, the Center argued that agricultural emissions are largely not from major stationary sources, but rather from fugitive emissions due to pesticide application, gases emitted from soil after fertilizer application, minor stationary sources, and mobile sources. The Center argued that Colorado state law thus is inadequate to provide authority to control these sources of pollution.<sup>61</sup>

As explained in the 2020 final rule, EPA disagreed with the Center's interpretation of the C.R.S. 25-7-109(8)(A) and instead concluded that Colorado is not prohibited under state law from regulating emissions from agricultural sources (however small)<sup>62</sup> as necessary to implement the 2015 ozone NAAQS.<sup>63</sup> In relevant part, the agricultural provision states that "the [State] shall regulate emissions from [agriculture, horticultural, or floricultural production, including pesticide application] . . . if they are 'major stationary sources', . . . or are required by Part C (prevention of significant deterioration), Part D (nonattainment), or Title V (minimum elements of a permit program), . . . ."<sup>64</sup> Thus, as stated in the 2020 final rule, the statute plainly *requires* regulation of emissions from agricultural sources, including from nonpoint sources, soils and pesticides, mobile sources, and minor sources, if required under the CAA, including as necessary under Part D for attainment of the NAAQS.

On remand, EPA verified that it properly interpreted Colorado law with respect to the State's authority to regulate agricultural sources, and, in particular, that Colorado law does not limit that regulatory authority to major sources. Indeed, Colorado has confirmed that it agrees with EPA's interpretation of C.R.S. 25-7-109(8)(A). In a letter submitted to EPA on July 29,

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<sup>61</sup> *Center for Biological Diversity v. EPA*, No. 20-9560 (Tenth Cir.), Petitioner's Opening Brief at 38-44.

<sup>62</sup> Emissions from agricultural sources make up a very small portion of NO<sub>x</sub> and VOC emissions statement in the Denver Metro/Northern Front Range nonattainment area. See 2017 NEI NO<sub>x</sub> VOC table, which is included in the docket for this action.

<sup>63</sup> 85 FR 20171.

<sup>64</sup> C.R.S. 25-7-109(8)(a).

2021, Colorado acknowledged that C.R.S. 25-7-109(8)(A) includes a “limited restriction” on the State’s authority to regulate emissions from agricultural production activities but explains that there are “important carve-outs” to that limited restriction. Colorado confirmed that the State has explicit authority to regulate major stationary sources. Colorado further explained that the sources that qualify as “major stationary sources” depends on the classification of the nonattainment area at issue—the higher the classification the lower the emissions threshold to qualify as a major stationary source. Additionally, Colorado confirmed in the letter that the State has “authority to regulate emissions from agricultural production, regardless of the size of the source, to the extent that such regulations are required by Part C (prevention of significant deterioration), Part D (nonattainment), or Title V (minimum elements of a permit program) of the federal [CAA].” Moreover, Colorado confirmed that the State has explicit authority to regulate emissions from agricultural production to the extent that such regulation is required by CAA section 111 (new source performance standards) and explained that such regulation is conducted through the State’s minor source, Prevention of Significant Deterioration, New Source Review, and Title V permitting programs. Finally, Colorado explained that the State has authority to promulgate, administer, and enforce emissions regulations that impact emissions from agricultural production, including mobile sources.<sup>65</sup>

Based on the above analysis and Colorado’s July 29, 2021 letter, EPA has now verified its interpretation of the State’s authority to regulate agricultural sources, as necessary to meet CAA requirements. Colorado has thus provided necessary assurances of the State’s authority to regulate agricultural sources as required in 42 U.S.C. 7410(a)(2)(E)(i). Accordingly, EPA is again proposing to approve Colorado’s infrastructure SIP submission for the 2015 ozone NAAQS with respect to the requirements of CAA section 110(a)(2)(E)(i).

### **III. Proposed Action**

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<sup>65</sup> Letter to Deb Thomas, Regional Administrator (Acting) and Deputy Regional Administrator, U.S. Environmental Protection Agency, Region 8, from Garrison Kaufman, Director, Air Pollution Control Division, July 29, 2021.

In this action, EPA proposes to conclude that Colorado's infrastructure SIP satisfies the interstate transport provision of the CAA, section 110(a)(2)(D)(i)(I), for the 2015 ozone NAAQS, and that the State has provided the necessary assurances of the State's authority to regulate all agricultural sources as may be required by the CAA under section 110(a)(2)(E)(i).

#### **IV. Statutory and Executive Order Reviews**

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the proposed rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: \_\_April 26, 2022.

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KC Becker,  
Regional Administrator,  
Region 8.

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